U.S. Senate
Republican Policy
Committee

Legislative Notice

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No. 32 March 29, 2006

S. 2454 – The Secure America's Borders Act

Calendar No. 376

S. 2454 was read twice and ordered placed on the Senate Calendar on March 16, 2006.

Noteworthy

- Under a unanimous consent agreement reached on March 28, the Senate will proceed to consideration of S. 2454 at a day and time to be agreed upon between the Majority and Minority Leaders. The first day of consideration – likely today – will be for debate only.
- S. 2454 was introduced by the Majority Leader prior to the Senate's March recess, and was placed on the Senate Calendar under Rule XIV. The bill would authorize numerous resources and provide additional tools to combat alien smuggling, secure the land borders, enforce internal immigration laws, and provide for a viable work authorization verification program. Like the House-passed bill (H.R. 4437), the bill does not provide for a guest-worker program. It does mirror the border security, immigration enforcement, and work authorization verification provisions of the bill reported out of the Judiciary Committee (with some exceptions for amendments made on March 27).
- On Monday, March 27, the Judiciary Committee passed, by a vote of 12-6 (4 Republicans voted in favor and 6 opposed), a comprehensive border security/immigration reform bill.
- That bill also includes language largely mirroring title VII of S. 1033, a bill sponsored by Senators Kennedy and McCain, that would provide for eventual "green cards" and a path to citizenship for most of the 11-12 million illegal aliens currently estimated to be residing in the United States.
- Titles I, II, and III (dealing with border security, enforcement, and work authorization verification) of the Chairman's mark are identical to same Titles of S. 2454, except for four amendments accepted on March 27.
- The March 28 unanimous consent agreement does not provide any limits on time or amendments. It is anticipated that Senator Specter will offer the Judiciary Committee bill as a substitute. ***[Note: at press time, the Committee's bill language was unavailable. This Notice contains a preliminary summary on pps. 15-23.]*** Many other amendments are anticipated [see listing beginning on p. 24.]
- On December 16, 2005, by a vote of 239-182, the House of Representatives passed H.R. 4437, which addresses border security but does not address the President's request for a guest-worker program.

Background

Illegal Immigration: A Growing Problem

In 1986, Congress passed the Immigration Reform and Control Act (IRCA) as a means to address the then-existing population of aliens without valid immigration status. The law effectively provided green cards (and, as a result, a path to citizenship) for what turned out to be 3 million illegal aliens in the United States (an amount that was well more than double the number that had been estimated (1.5 million)). Other smaller scale programs to legalize unauthorized aliens (less than 1 million illegal immigrants) occurred in 1994, 1997, 1998, and in 2000.[1]

Today, according to the Pew Hispanic Center, there are an estimated 12 million unauthorized migrants in the United States: "March 2005 Current Population Survey shows that there were 11.1 million unauthorized migrants in the United States a year ago. Based on analysis of other data sources that offer indications of the pace of growth in the foreign-born population, the Center developed an estimate of 11.5 to 12 million for the unauthorized population as of March 2006."[2]

The President's Proposal

On January 7, 2004, the President presented a plan for comprehensive immigration reform in his State of the Union address to the nation. In his speech, and in later speeches, he called for a program that would address the illegal alien population by offering temporary worker visas lasting a total of six years, but provide for no special path to citizenship and no amnesty. The temporary work program ("TWP") would match willing employers with willing foreign employees, so long as there was no American worker willing and able to take the job.

On the issue of amnesty, the President recently stated, "One thing the temporary worker program would not do is provide amnesty to those who are in our country illegally. I believe that granting amnesty would be unfair, because it would allow those who break the law to jump ahead of people who play by the rules and wait in the citizenship line. Amnesty would also be unwise, because it would encourage waves of illegal immigration, increase pressure on the

[1] The FY1995 Commerce, Justice, State Appropriations bill included an addition of section 245(i) to the Immigration & Nationality Act in 1997 (that section allows for illegal aliens to gain a green card by paying a stiff fine); section 245(i) was extended in H.R. 2267; The Nicaraguan Adjustment and Central American Relief Act (NACARA) granted amnesty to certain Nicaraguans and Cubans, and, in effect, did the same for certain Salvadorans, Guatemalans and Eastern Europeans; in 1998, Congress passed The Haitian Refugee Immigration Fairness Act (HRIFA) for Haitians; and, in 2000, Congress passed the LIFE Act and other aliens were also allowed to gain green cards as a result of a political and court settlement.

[2] Pew Hispanic Center, "Size and Characteristics of the Unauthorized Migrant Population in the U.S.," March 7, 2006.

border, and make it more difficult for law enforcement to focus on those who mean us harm. For the sake of justice and for the sake of border security, I firmly oppose amnesty."[3]

House Action

On December 16, 2005, the House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) by a vote of 239-182 (with 30 Democrats voting in favor and 18 Republicans opposed). The bill only addresses border control and internal immigration enforcement, and so does not directly respond to the President's request for a guest-worker program. Meanwhile, since the bill's passage, over 85 Members of the House of Representatives have pledged to vote against any kind of guest worker visa akin to the President's proposal. One of the more controversial provisions of H.R. 4437 was making "illegal presence" a felony (a manager's amendment to reduce that to a misdemeanor failed, with most Democrats voting against). Additionally, some opponents claim that the bill would make church and humanitarian organization assistance to unauthorized migrants a crime under the human smuggling provisions. (*Note: The Senate Judiciary Committee-reported bill carves out a specific exception for these organizations.)*

Senate Judiciary Committee Action

On March 7, 2006, Judiciary Committee Chairman Specter began the markup proceedings on his own proposed compromise between two major immigration bills that had been offered by Senators sitting on the Committee. In brief, Senators Cornyn and Kyl (both Committee Members) offered a plan that would create temporary worker visas that would be limited to the six years that the President proposed. Senator Kennedy (also a Committee Member) and Senator McCain proposed a plan that would create a six-year temporary work visa for 400,000 aliens per year (with that number increasing every year), and would provide all of the 12 million unauthorized aliens Permanent Residency ("green cards") and, thus, a path to citizenship.

The "Chairman's Mark" provided for an unlimited number of temporary work visas, based on the Cornyn-Kyl bill, but also provided for a "gold card" for all unauthorized aliens present in the United States at the time of the President's 2004 State of the Union address. The "gold card" would change the status of unauthorized aliens into a legal status but without granting them green cards; however, it was left unclear as to whether "gold card" holders would have a special path to obtain a green card and eventual citizenship.

After four days of markup (over a two-week period), the Committee found relative compromise on the border security and internal immigration enforcement provisions of the Chairman's Mark. Senator Grassley objected to issues raised in Title III of the Mark (dealing with employment authorization verification reform) on the basis that it infringed on the jurisdiction of the Finance Committee. A quick compromise was established wherein Senator Kyl would work with Senator Grassley to craft compromise language that would have the Finance Committee's "blessing," to be offered again in Committee or on the Floor.

[3] President's Radio Address, March 25, 2006.

When debate began on the contentious Titles IV through VI (the temporary worker visas, visa numerical limits, and green card provisions), Chairman Specter again called for a compromise between the Senators who call for providing green cards to the unauthorized population and those Senators who prefer to provide only temporary visas or no visas at all. Staff members of the Committee and Committee Members met over the recess to work towards a compromise solution.

A subsequent markup took place on Monday, March 27, the day the Majority Leader had announced would be the absolute deadline for bringing the comprehensive immigration reform bill to the Floor. Senator Feinstein's amendment to legalize only agricultural workers out of the unauthorized migrant population won approval. (*Note: this amendment is the same as Senator Craig's bill (S. 359) with some changes to the green card provisions and with an expansion of the current H-2A sheepherder carve-out to cover dairy-related work.)* Another Feinstein amendment, cosponsored by Senator Kyl, on criminalizing the building of border tunnels, won approval. Various other amendments related to enforcement passed. Ultimately, the title of the Chairman's mark relating to legalizing the unauthorized population was substituted with the McCain-Kennedy plan proposal (Title VII of S. 1033). The title providing for a new temporary worker program was substantially modified, also by the McCain-Kennedy plan (see Title III of S. 1033).

Majority Leader's Bill

On March 16, 2006, the Majority Leader introduced his own bill, S. 2454, the Secure America's Borders Act (SABA), and immediately filed for cloture on the motion to proceed to his bill. A vote on cloture on the motion to proceed would have occurred Tuesday, March 28, but that motion was subsequently vitiated. Instead, unanimous consent to proceed to S. 2454 was reached and to have the bill open to debate only during the first day of consideration, after which, it would be open to amendments.

S. 2454 is based, in part, on Senator Specter's compromise Chairman's mark in that it adopts that bill's Titles I, II, and III (the border security, enforcement, and work authorization verification provisions) as those titles were amended by the Committee in its markup sessions prior to March 16. (Additional amendments were made to those titles by the Committee on March 27.) Like the House-passed bill, S. 2454 does not provide for a guest worker program or for green cards to illegal aliens, but it does provide some additional benefits to foreign students and highly skilled immigrants. [See the Bill Provisions section, below, for more details on S. 2454. For a discussion of the Committee-reported bill, see the Possible Amendments section, beginning on p. 15.]

Bill Provisions

The following sections provide a summary of the major sections of S. 2454 according to subject matter; this is not a comprehensive section-by-section review of the bill. [The summary of the Judiciary Committee-reported bill is on pp. 15-23 of this Notice.]

BORDER SECURITY PLANS, STRATEGIES AND REPORTS

S. 2454 requires the Secretary of Homeland Security to submit a comprehensive plan for the systematic surveillance of the U.S. land and sea borders and a National Strategy for Border Security. The Secretary of State is required to report on improving the exchange of information related to the security of North America (including progress made on security clearances and terrorist watch lists). It also directs the FBI to establish a database to track criminal gang activities in Central America.

BORDER ENFORCEMENT ASSETS FOR CONTROLLING US BORDERS

Enforcement Personnel. The bill authorizes 250 new Customs and Border Protection (CBP) officers, 200 new positions for investigative personnel to investigate alien smuggling, and 250 additional port of entry inspectors, annually from FY 2007 to FY 2011. It also increases the number of customs enforcement inspectors by 200 in section 5203 of the Intelligence Reform and Terrorism Prevention Act of 2004. It also authorizes 2,400 additional border patrol agents annually for six years – adding an additional 4,400 agents to the border over six years to the 10,000 already added by the Intelligence Reform and Terrorism Prevention Act of 2004 (for a total of 14,400 new Border Patrol Agents by 2011).

Technological Assets and Infrastructure. The bill authorizes such sums as necessary for the acquisition of unmanned aerial vehicles, cameras, poles, sensors and other technologies to achieve operational control of the borders, and to construct all-weather roads and add vehicle barriers along the borders. It requires the Department of Homeland Security (DHS) to replace damaged primary fencing with double- or triple-layered fencing in Arizona population centers on the border, and to construct at least 200 miles of vehicle barriers and all-weather roads in areas that are known transit points for illegal cross-border traffic.

US-VISIT. The Secretary of DHS, by October 1, 2007, will be required to enhance the connectivity between the Automated Biometric Fingerprint Identification System (IDENT) and Integrated Automated Fingerprint Identification System (IAFIS) biometric databases, and collect all fingerprints from individuals through the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program during their initial enrollment. The bill also requires DHS to submit to Congress a timeline for equipping all land border ports of entry with the US-VISIT system and deploying at all land border ports of entry the exit component of the US-VISIT system. It also authorizes DHS to collect biometric data from any alien or LPR seeking admission to, exit from, transit through, or parole into the U.S., and provides that failure to comply with the biometric requirements is a ground for inadmissibility.

Improved Document Integrity. The bill requires that immigration-status documents, other than interim documents, issued by DHS be machine-readable, tamper-resistant, and incorporate biometric identifiers by October 26, 2007. It also voids visas held by a nonimmigrant alien if the alien remains in the U.S. beyond the period of authorized stay, and requires aliens who overstay to return to their consulate abroad to undergo additional screening before being able to return to the U.S. The bill requires that all immigration inspectors receive training in identifying and detecting fraudulent travel documents and obtain access to the Forensic Document Laboratory.

The bill provides a comprehensive rewriting of chapter 75 of title 18 (passports and visa fraud) and also expands passport, visa, and immigration fraud. It also creates a new crime for:

- trafficking in passports and punishing those who unlawfully produce, issue, transfer, forge, or falsely make passports, as well as those who transact in passports they know to be forged or counterfeited, and those who prepare, submit, or mail applications for passports that they know include a false statement;
- completing, signing, or submitting a passport application knowing that it contains a false statement or representation;
- knowingly and without lawful authority producing or issuing a passport for or to any person not owing allegiance to the United States;
- knowingly and without lawful authority transferring a passport to a person for use when such person is not the person for whom the passport was issued or designed;
- knowingly using a passport to enter or attempt to enter the country, knowing that the passport is forged or counterfeited;
- knowingly using a passport to defraud an agency of the United States or a State, knowing that the passport is forged or counterfeited;
- knowingly executing a scheme to defraud any person in connection with any matter arising under the immigration laws or that the offender claims arises under the immigration laws;
- knowing use of any immigration document issued or designed for use by another;
- trafficking in immigration documents;
- knowingly and without lawful authority, producing, obtaining, or possessing various papers, seals, symbols, or other materials used to make immigration documents;
- entering into multiple marriages to evade immigration law; and,
- arranging, supporting, or facilitating such multiple marriages.

The bill renders inadmissible and removable any alien convicted of a passport or visa violation under Chapter 75 of title 18.

Expedited Removal. The bill mandates the use of expedited removal of illegal aliens who are apprehended within 100 miles of the border or 14 days of unauthorized entry. Additionally, this section amends the current immigration law to expand the scope of offenses subject to the expedited removal program for incarcerated or deportable aliens and allows DHS to use expedited removal for criminal aliens found in correctional institutions.

INTERIOR IMMIGRATION ENFORCEMENT

The bill mandates each State to have at least 40 immigration enforcement agents, and at least 15 service personnel (the Secretary of Homeland Security may waive thisrequirement for states with smaller populations).

Removal and Denial of Benefits to Terrorist Aliens. The bill amends the Immigration & Nationality Act (INA) so that all aliens inadmissible on terrorism-related grounds are ineligible for asylum and also makes them ineligible for cancellation of removal. *(Note: current law provides that all aliens "inadmissible" and "deportable" on security-related grounds are ineligible; subsection (b) provides that all aliens "described in" those provisions are also ineligible. This would correct a procedural loophole: unlike immigration judges, initial adjudicators of asylum cannot make an inadmissibility finding and, therefore, may be put in the position of granting asylum to an alien who is inadmissible on security-related grounds, such as terrorism. This section applies to aliens in removal, deportation, and exclusion proceedings on the date of enactment, and to acts or conditions occurring before, on, or after the date of enactment.)*

The bill provides that no alien shall be found to have "good moral character" for purposes of the INA if DHS or DOJ determines that the alien is described in sections 212(a)(3) (excludable on security-related grounds) or 237(a)(4) (removable on security or related grounds). It also provides that a petition for granting certain classes of immigrant status may not be granted if there is any proceeding pending that could result in the petitioner's denaturalization or loss of the petitioner's lawful permanent resident status.

The bill bars from being naturalized any alien whom DHS determines to have been at any time an alien described in INA sections 212(a)(3) (excludable on security or related grounds) or 237(a)(4) (removable on security or related grounds). The bill modifies the law governing judicial review of naturalization decisions. Subsection (d)(1) requires an alien to seek review of the denial of his application for naturalization within 120 days of DHS's final determination, and imposes on the alien the burden of showing that DHS's denial was contrary to law. It also removes jurisdiction from the courts, except in proceedings to revoke naturalization, to review or make any determination that an alien is a person of good moral character, understands and is attached to the principles of the Constitution, and is well-disposed to the good order and happiness of the United States.

It also requires DHS and DOJ to wait until the completion of background and security checks before granting any immigration-related status or benefit or issuing documentation evidencing such a grant.

Detention and Removal of Aliens. The Supreme Court's decision in Zadvydas v. Davis, 533 U.S. 678 (2001) mandates the release of former criminal aliens detained for the purpose of deportation if their deportation cannot be secured within six months. *(Note: many countries refuse to accept some of their own citizens or otherwise make it very difficult for DHS to deport them home.)* The bill provides authority to detain beyond the removal period aliens ordered removed who are inadmissible; who are removable as a result of violations of status

requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy; or who have otherwise been determined by the Attorney General to constitute a risk to the community or to be unlikely to comply with the order of removal. It also provides that such aliens may be detained beyond the removal period in the discretion of DHS and without any limitations, but provides factors to consider:

- With respect to aliens who have effected entry to the United States and have fully cooperated with the Government's efforts to carry out removal, DHS may detain such aliens until removal after making one of a variety of certifications.[4] DHS must renew such a certification every six months for as long as it wants to continue detaining the alien. In the absence of a certification, the alien is to be released, although conditions may be imposed and re-detention is possible. DHS may not delegate the decision to certify or renew a certification to an officer inferior to the Assistant Secretary of Immigration and Customs Enforcement (ICE).
- With respect to aliens who have effected an entry to the United States and would be removed but for failure to cooperate fully with removal efforts, DHS may detain them until the alien makes all reasonable efforts to comply with the removal efforts.
- With respect to aliens who have not effected an entry to the United States, DHS is required to follow the guidelines set forth in a specified provision of the CFR.

The bill also:

- permits the government to penalize aliens for failing to depart because they were inadmissible;
- changes the base penalty for an alien's failure to depart to a mandatory minimum of 6 months and a maximum of 5 years, along with a fine;
- changes the penalty for an alien's willful failure to comply with the terms of release under supervision by removing any statutory limit on the fine and adding a mandatory minimum of 6 months and a maximum of 5 years, or 10 years for certain categories of deportable aliens; and
- allows the Secretary of Homeland Security to instruct the Secretary of State to deny issuing a visa to any national of a country if that country refuses to accept the return of its nationals. The language only relates to visa issuance, not denial of admission at port-of-entry, ensuring that refugees/asylees are not impacted and that aliens know they will not be admitted before they travel to the U.S.

The bill authorizes DHS to extend the Institutional Removal Program (IRP), which identifies removable aliens in Federal and State prisons and removes such aliens after completion of their sentences, to all states.

It also directs the Secretary of DHS to study the effectiveness of alternatives to detention, including electronic monitoring and the Intensive Supervision Appearance Program (ISAP).

[4] These include: there is a significant likelihood that the alien will be removed in the reasonably foreseeable future; the alien has a highly contagious disease posing a threat to public safety; release of the alien will have serious adverse consequences for foreign policy or national security; and, under some circumstances, release of the alien will threaten the safety of the community or any person.

Aggravated Felony. The term "aggravated felony" under the INA is modified to include (a) convictions even if the length of the sentence was based on recidivist or other enhancements, (b) all human smuggling crimes, (c) any felony conviction under INA section 275 (Improper Entry by an Alien) and section 276 ("Reentry of Removed Alien"), and (d) soliciting, aiding, abetting, counseling, commanding, inducing, or procuring another to commit one of the crimes listed already in the definition. *(Note: the current definition covers only crimes under Sections 275(a) and 276 that were committed by an alien previously deported for another aggravated felony; by capturing the rest of Section 275, the definition now includes felony convictions for marriage fraud and immigration-related entrepreneurship fraud).* The bill also bars a refugee convicted of an aggravated felony from eligibility for adjustment of status (i.e., would not be allowed to get a green card).

Gang Violence. The bill renders inadmissible any alien who is known to be or believed to be (by a consular officer, or DOJ or DHS employee) a member of a gang, or who has participated in such a gang's activities if the alien knows or has reason to know that such activities supported the gang's illegal conduct. Temporary Protected Status (TPS) is denied to any alien who is a member of a gang, or who has been at any time after admission.

Alien Smuggling. The bill strikes and replaces the provision of the INA covering alien smuggling and related offenses. Substantive changes include:

- expanding the alien-smuggling crime to cover individuals who "facilitate[], encourage[], direct[], or induce[]" an alien to enter the country at other than a designated port of entry, and to cover those who act with reckless disregard of the alien's unlawful immigration status;
- creating a new crime for transporting or harboring certain aliens in unlawful transit outside the U.S., under circumstances in which the alien is seeking to enter the United States unlawfully; and,
- criminalizing attempts to encourage or induce an alien to reside or remain in the United States.

The bill adds alien smuggling to the list of crimes during and in relation to which 18 U.S.C. § 924(c) provides a mandatory minimum for carrying or using a firearm.

Are churches criminalized for assisting illegal aliens? The bill clarifies that a religious organization is not guilty of alien smuggling if it provides room, board, travel, and medical assistance to an alien serving as a minister or missionary in a volunteer capacity, provided that the alien has been a member of the religious denomination for at least one year. The bill also dispenses with the current penalty scheme for alien smuggling and provides increasing penalties depending on whether the offense was committed for profit, and provides for extraterritorial federal jurisdiction.

Unlawful Presence of an Alien and Illegal Entry. The bill modifies INA Section 275 (illegal entry) by criminalizing, as a misdemeanor, an alien's knowing unlawful presence in the United States. The bill provides higher maximum penalties for aliens convicted of illegal reentry

who have a sufficiently serious criminal record. It also adds an element to an affirmative defense available to aliens previously denied admission and removed.[5]

Diplomatic Security Services. Section 215 authorizes Special Agents of the State Department and the Foreign Service to investigate identity theft, document fraud, peonage, slavery, and Federal offenses committed within the special maritime and territorial jurisdiction of the United States.

State and Local Law Enforcement of Federal Immigration Laws. The bill requires the Secretary of Homeland Security to reimburse state/local police organizations for training required under § 287(g).

Reporting Requirements. The Secretary should provide for appropriate coordination and cross-referencing of address information provided by aliens. The Secretary can rely on the most recent address provided by an alien to the Secretary for any purpose under the immigration laws as an address to contact the alien.

Protecting Immigrants from Convicted Sex Offenders. The bill prohibits certain criminals (i.e., convicted sex offenders) from sponsoring an alien (e.g., spouse or fiancée) for a green card unless the DHS determines that the sponsor poses no threat to the alien.

Immigration Violators in the NCIC Database. Section 230 directs ICE to work with the FBI to place information on certain immigration violators into the already existing Immigration Violators File (IVF) of the National Crime Information Center database.

INCREASED WORKSITE ENFORCEMENT AND PENALTIES

Unlawful Employment of Aliens. *(Note: As mentioned above, Senators Kyl and Grassley intend to offer a substitute amendment providing for a more comprehensive employment authorization verification system.)* The bill amends Section 274A of the Immigration and Naturalization Act dealing with the illegal hiring of unauthorized workers. (*Note: the Republican Policy Committee has produced a comprehensive policy paper on this issue*).[6] Essentially, this section expands the current "I-9 Form" system in which employers ask new hires for identification and work authorization papers (out of a total of 29 possible documents). Under current law, the employer is required to authenticate the documents and certify such on the I-9 form but is also prohibited from refusing to accept facially valid documentation in the process (or is open to charges of discrimination under this same section of law). The I-9 form is kept with the employer and only inspected upon demand by ICE. In the last two years, ICE has issued only three Notices-of-Intent-to-Fine (NIFs) to employers. S. 2454 expands the requirements of the present system while instituting an electronic-based system.

[5]The element is that, in addition to the existing element that the alien was not required to obtain advance consent to reapply for admission, the alien had complied with all other laws and regulations governing the alien's admissibility.

[6]"Alien Work-Authorization Verification: Can This Broken System Be Fixed?", February 28, 2006. www.rpc.senate.gov.

Mandatory Electronic Verification. The bill makes the "Basic Pilot Program" mandatory for all employers over the course of five years (in the form of the Electronic Verification System). This online, Internet-based system would require the employer to enter the name, Social Security Number and, in the case of an alien, his Alien Number (telephonic verification would also be available). DHS and Social Security Administration (SSA) databases would immediately confirm or tentatively not confirm the new hire's ability to work. A new employee who receives a non-confirmation would have two weeks to clear up any records with SSA or DHS, or the employer would be required to terminate the employment.

The bill requires DHS to maintain records of inquiries and responses to inquiries, allowing for a robust audit capability. The verification system must provide an initial response within 3 days. Until the employer receives an answer, the employment relationship may continue. If the employer receives a tentative non-confirmation from the verification system, the employee may contest that finding. While the tentative non-confirmation is being contested, the employer may not terminate the employee based on a lack of work authorization.

The bill requires that the system be designed and operated for maximum reliability, ease of use, and safeguarding against unauthorized disclosure of private information as well as unlawful discriminatory practices. This section requires the SSA Commissioner to establish a system to compare names with SSNs in order to confirm or not confirm their correspondence as well as whether a SSN is authorized for employment, and prohibits the disclosure of such Social Security determinations to employers. The section requires the Secretary of Homeland Security to establish a system to compare names with alien identification or authorization numbers in order to confirm or not confirm work authorization. This section also requires updating of information for maximum accuracy.

Penalties. The bill provides that, in a civil enforcement context, if the Secretary determines that an employer has hired more than 10 unauthorized aliens within a calendar year, a rebuttable presumption is created that the employer knew or had reason to know that such aliens were unauthorized. However, the bill provides a defense for employers who comply in good faith with the requirements of the bill and who voluntarily use the Electronic Employment Verification System.

Employer Compliance Fund. The bill establishes an Employer Compliance Fund into which funds derived from civil penalties are to be deposited. The Employer Compliance Fund shall be used for enhancing and enforcing employer compliance with section 274A.

Misrepresentation of Citizenship Status. The bill creates a technical change that conforms section 212 to section 274A of the INA. This provision closes a loophole in the ground of inadmissibility for falsely claiming U.S. nationality in section 212 of the INA that has been exploited to obtain unauthorized employment and subsequently evade removal. The employment verification provisions in section 274A of the INA require an employee to certify that (unless claiming work authorized alien status) he is a "citizen or national" of the United States. The Form I-9 uses this formulation. The parallel ground of inadmissibility, although it refers specifically to section 274A verification, only uses the phrase "citizen." Some aliens have

escaped the consequences of their misrepresentations by successfully arguing that a false attestation that one is a "citizen or national" is not covered by the ground of inadmissibility. A false attestation to any form of U.S. nationality would have the same consequences in employment verification or in other circumstances.

BACKLOG REDUCTION AND VISAS FOR STUDENTS AND ALIENS WITH ADVANCED DEGREES

Elimination of Existing Backlogs. The bill reduces visa backlog waiting times by allowing the recapture of unused visa numbers, and it increases the number of employment-based green cards from 140,000 to 290,000.

Country Limits. The bill increases the per-country limits for family-sponsored and employment-based immigrants from 7 percent to 10 percent.

Allocation of Immigrant Visas. The current 480,000 ceiling on family-sponsored immigrants is redistributed among existing family preference categories. The bill restructures visa number availability to provide additional visas for unskilled workers (who are limited to 5,000/year) and other categories where visas have not kept up with demand. The 290,000 ceiling for employment-based immigrant visas is redistributed among the employment-based immigrant visa categories and certain modifications are made to current categories.

Student Visas. The bill extends foreign students' post-curricular Optional Practical Training (and F-1 status) to 24 months. It also creates a new "F-4" student visa for advanced degree candidates studying in the fields of math, engineering, technology or the physical sciences. The new visa will allow eligible students to either to return to their country of origin or remain in the United States for up to one year and seek employment in their relevant field of study. Once such a student receives such an offer of employment, the individual will be allowed to adjust status to that of a legal permanent resident after paying a $1,000 fee and completing necessary security clearances. Of the fees collected, 80 percent will be deposited into a fund for job training and scholarships for American workers, while 20 percent will go toward fraud prevention.

Visas for Individuals with Advanced Degrees. The bill exempts from the numerical cap on employment-based visas those aliens with advanced degrees in science, technology, engineering, or math who have worked in a related field in the United States during the three-year period preceding their application for adjustment of status. It also exempts immediate relatives of aliens who are admitted as employment-based immigrants from the numerical limitations of 203(b). Finally, it increases the available visa numbers for H-1B non-immigrants and provides an exemption from the numerical limitation for aliens who have earned advanced degrees in science, technology, engineering, or math.

Medical Services in Underserved Areas. The bill permanently authorizes the current J-1 visa waiver program. Under this program, participating states are allocated 30 J-1 visa waivers, which enables them to waive the two-year home-residency requirement for medical students and

physicians who serve in "medically underserved areas" upon completion of their J-1 program. The program has been reauthorized twice before and is now set to expire on June 1, 2006.

IMMIGRATION LITIGATION REDUCTION

Consolidation Of Immigration Appeals. The bill consolidates all INA civil and administrative appeals into the United States Court of Appeals for the Federal Circuit, and increases the number of authorized judgeships in the Federal Circuit by 3, to a total of 15. The amendments made by this section shall apply to any final agency order or District Court decision entered on or after the date of enactment of this Act.

Additional Immigration Personnel. The bill directs the Secretary of Homeland Security to increase annually in FY 2007-2011 the number of investigative personnel investigating immigration violations by not less than 200 and the number of trial attorneys in the Office of General Counsel working on immigration by not less than 100, subject to the availability of appropriations. It also directs the Attorney General to increase annually in FY 2007-2011 the number of litigation attorneys in the Office of Immigration Litigation by not less than 50, the number of Assistant U.S. Attorneys who litigate immigration cases in Federal courts by not less than 50, and the number of immigration judges by not less than 50, subject to the availability of appropriations. Finally, it authorizes appropriations for additional Assistant Federal Public Defenders who litigate Federal criminal immigration cases in Federal court.

Board of Immigration Appeals Removal Order Authority. The bill grants the Board of Immigration Appeals authority to enter an order of removal without remanding to the immigration judge. It also conforms certain terminology to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) by inserting the term "order of removal," and inserting the term "immigration judge" in place of the term "special inquiry officer," and expanding the situations in which orders of removal are deemed final.

Judicial Review of Visa Revocation. The bill provides that the decision to revoke a visa and the removal order predicated on that revocation are not reviewable. Review of a final order of removal, however, is still permitted under 8 U.S.C. § 1252(a)(2)(D) when questions of statutory interpretation or alleged constitutional infirmity arise.

Reinstatement of Removal Orders. The bill clarifies that section 241(a)(5) of the INA (8 U.S.C. § 1231(a)(5)) does not require further hearing by an immigration judge in cases in which prior orders of removal are reinstated against aliens who illegally reenter the United States. This provision applies to orders of deportation or exclusion issued in cases initiated before April 1, 1997, and clarifies that the alien's ineligibility for relief is not dependent on when the alien applied for such relief. This section also provides that reinstatement orders are not reviewable.

Certificate of Reviewability. The bill establishes a screening process for aliens' appeals of Board decisions under which appeals of removal orders will be referred to a single judge on the Federal Circuit Court of Appeals. If the alien establishes a prima facie case that the petition

for review should be granted, the judge will issue a ''certificate of reviewability'' allowing the case to proceed to a three-judge panel; otherwise it is dismissed.

Discretionary Decisions on Motions to Reopen or Reconsider. The bill revises the statutory provisions relating to motions to reopen and motions to reconsider to state expressly that the Attorney General's decision whether to grant or deny such motions are committed to his discretion, subject to existing statutory exceptions. This section adds a special provision providing for reopening in order to consider withholding of removal or protection under the Convention Against Torture claims in one limited circumstance. These amendments are applicable to all motions to reopen or reconsider filed on or after the date of enactment in any removal, deportation, or exclusion proceeding.

Prohibition of Attorney Fee Awards for Review of Final Orders of Removal. Section 509 abolishes EAJA fee awards in immigration cases for aliens who are removable, except when the Attorney General's or the Secretary's determination regarding removability was not substantially justified.

Board of Immigration Appeals. The bill directs the Attorney General to promulgate regulations to require the Board of Immigration Appeals to hear cases in three-member panels (unless certain conditions are met) and to permit the Board limited authority to issue affirmances without opinion.

Administration Position

At press time, the Administration has not issued a Statement of Administration Position on S. 2454 (nor on the Judiciary Committee's bill). However, as stated above, the President has outlined his plan. On January 7, 2004, the President presented a plan for comprehensive immigration reform in his State of the Union address. In his speech, and in later speeches, he called for a program that would address the illegal alien population by offering temporary worker visas lasting a total of six years, but provide for no special path to citizenship and no amnesty. The temporary work program ("TWP") would match willing employers with willing foreign employees, so long as there was no American worker willing and able to take the job.

CBO Estimate

The Congressional Budget Office has not provided an estimate on the cost of S. 2454 at this time.

Possible Amendments

A number of amendments are expected to be offered to S. 2454, including (perhaps as a substitute) the Committee-reported product, the Cornyn-Kyl plan, and the McCain-Kennedy plan. Other perfecting amendments are anticipated as well.

JUDICIARY COMMITTEE-REPORTED BILL

THE COMPREHENSIVE IMMIGRATION REFORM ACT OF 2006

On March 27, 2006, the Judiciary Committee reported out a bill that is likely to be offered as a substitute during the Senate's consideration of S. 2454. The vote was 12-6, with Republican Senators Specter, DeWine, Graham, and Brownback joining the eight committee Democrats in voting to report, and Senators Hatch, Grassley, Kyl, Sessions, Cornyn, and Coburn voting against reporting the bill. (*Note: as such, the reporting of the bill did not meet the purported preference of Leadership that it pass Committee with a majority of the Majority voting for the bill.*)

Titles I (border security), II (internal immigration enforcement), and III (work authorization verification) are exactly the same as those titles in S. 2454, except that, on March 27, the committee passed the following amendments, as offered by Senator Sessions, to:

- study the current level of illegal immigration in the United States;
- study the impact that granting of legal status and increasing the current level of illegal immigration would have on the infrastructure and quality of life in the United States;
- increase federal immigration detention space by 50% (10,000 beds) through the use of new construction and the acquisition of recently closed military bases; and
- allow U.S. Attorneys to determine the immigration status of individuals charged with Federal Offenses (the identification requirements will help to insure that the cases are prosecuted with appropriate legal references and reduce the likelihood of dismissal or erroneous decisions).

Senators Kyl and Feinstein offered, and the Committee accepted, an amendment to criminalizing building tunnels under the border line, and for having reckless disregard that a tunnel was built on one's land.

(Note: substantial discussion was devoted to Senator Grassley's objection to Title III on the grounds that jurisdiction on this Title belonged to the Finance Committee. The compromise agreed to in the Judiciary Committee was that Senators Kyl and Grassley would hammer out an acceptable compromise. Senator Kennedy asked that his staff be a part of discussions. That compromise is expected to be offered as an amendment during the Floor consideration.)

Title IV – New H-2C Nonimmigrant Visa Leading to Gain a Green Card

(Note: this section was amended substantially by Senator Kennedy's amendment, but was not a complete substitute of the McCain-Kennedy plan for a new flow of temporary workers. However, it eliminated any requirement that the temporary worker return home for a period of one year before reentering as an H-2C visa holder; it also allows all H-2C visa holders to gain a green card and eventual citizenship; and it struck the provisions in S. 2454 denying discretionary relief in certain cases.)

Nonimmigrant Temporary Worker.

This section creates a new temporary worker visa (H-2C) that could be issued to an alien who "has a residence in a foreign country which the alien has no intention of abandoning" and who is coming here to temporarily perform labor or services, if an American employer sponsor could not find unemployed Americans capable of performing such services. It authorizes the Secretary of Homeland Security to grant a temporary visa if the alien provides proof of eligibility to work and evidence of employment. The alien also must pay a $500 visa issuance fee and undergo a medical examination. The alien cannot have one of the visa inadmissibilities found under 212(a) of the INA, and is required to provide fingerprints and/or any other biometric identifier required by DHS. The State Department may not issue a visa to, and DHS may not admit, such a nonimmigrant until all appropriate background checks have been completed. The alien is authorized to work in the U.S. for an initial period of 3 years, and the visa is renewable for an additional 3 years. The alien must leave at the end of the authorized period. The alien must also leave the United States if the alien is unemployed for more than 60 days *(note: the Chairman's mark set this requirement at 45 days).* The alien is also permitted to travel outside of the United States and may change employers, if the employer complies with section 218B of the INA. If the alien fails to depart the U.S. at the end of the authorized period, the alien many not apply for any immigration relief. Dependents of H-2C workers are allowed to come to the U.S. *(note: Sen. Kennedy's amendment originally made a specific prohibition of such aliens who would become a public charge).* The Title requires that the Secretary of Homeland Security shall establish an alien employment system to manage and track the employment of H-2C nonimmigrants, and it requires the Secretary of Labor to coordinate and implement an electronic job registry and a nationwide system of public labor exchange services to provide information on employment opportunities available nationwide for U.S. workers.

Employer Obligations.

Requires employers to comply with all applicable Federal, state, and local laws, and to provide a petition to DHS that includes an attestation requirement. The attestation requires petitioning employers to attest that:

- the employment of a temporary worker will not adversely affect the wages and working conditions of similarly employed workers in the U.S. and will not cause the separation from employment of a U.S. worker employed by the petitioner.
- the temporary worker will be paid at least the wages required by law at the place of employment or the wage established by collective bargaining, where applicable.

- if the position is not covered by state workers compensation law, the employer shall provide, at no cost to employee, insurance covering injury or disease arising out of and in the course of the worker's employment, which will provide benefits at least equal to those provided under state workers compensation law for comparable employment.
- except where DOL has determined there is a shortage of U.S. workers in the occupation and area of intended employment, that there are not sufficient able, willing, and qualified employees who are available at the time and place needed.
- the employer has made good faith efforts to recruit U.S. workers including, recruitment at least 14 days but no more than 90 days prior to filing.
- there is no strike, lockout, or work stoppage in the course of a labor dispute in the occupation at the place of employment.

The employer must also attest that the job is a bona fide job for which the employer needs labor or services and the employer will be able to place the employee on the payroll. The employer is also required to notify the Secretaries of Labor and Homeland Security of a temporary worker's separation from employment or transfer to another employer no longer than three days after transfer. A copy of each petition and documentation will be provided to every temporary worker employed under the petition to DOL and will be made available for public examination at the place of business. These documents must also be made available to the Secretary of Labor during any audit, and must remain available for examination for five years from when the petition was filed. The petition must be filed within 60 days prior to actual need. The section also provides whistleblower protection for H-2C workers and requires foreign labor contractors (and employers that engage in foreign labor contracting activity) to disclose a variety of information to the nonimmigrant workers at the time of their recruitment, including, among other things, the location of employment, a description of the duties, compensation, benefits provided and any associated costs, existence of any labor dispute or labor organizing effort, the extent of any insurance coverage, any education or training required or provided, and a statement describing the protections of this Act. Foreign labor contractors are prohibited from providing false or misleading information and may not assess any fees to the worker for such recruitment. This section also requires registration and certification of foreign labor contractors who recruit workers under this program, and further requires the Secretary of Labor to promulgate regulations to establish a process for the investigation and approval of an application for a certificate of registration of foreign labor contractors. Such certificates will be valid for two years, and the Secretary may refuse to issue or renew, or may suspend or revoke, a certificate of registration. This section also provides remedies for foreign labor contractor violations, and requires the Secretary of Labor to prescribe regulations for the receipt, investigation, and disposition of complaints by individuals harmed under this section. In addition, Section 304 sets forth an administrative process under which workers who are harmed by violations of the program can bring a complaint. *(Note: Senator Kennedy's amendment changed the definition of "employer" to that already defined in the Fair Labor Standards Act of 1938; further, Department of Labor applications would have to be written in languages the workers could understand; penalties could be meted out for violations of the petition process.)*

Student Visa.

This Title extends foreign students' post-curricular Optional Practical Training (and F-1 status) to 24 months. It also creates a new "F-4" student visa for students pursuing an advanced degree in the fields of math, engineering, technology or the physical sciences. The new visa allows eligible students to either return to their country of origin or remain in the United States for up to one year and seek employment in their relevant field of study. Once such a student receives such an offer of employment, the individual would be allowed to adjust status to that of a legal permanent resident after paying a $1,000 fee and completing necessary security clearances. Of the fee payments, 80 percent will be deposited into a fund for job training and scholarships for American workers, while 20 percent will go toward fraud prevention.

Visas for Individuals with Advanced Degrees.

The bill exempts from the numerical cap on employment-based immigrant visas aliens with advanced degrees in science, technology, engineering, or math who have worked in a related field in the United States during the three-year period preceding their application for adjustment of status. It also exempts immediate relatives of aliens who are admitted as employment-based immigrants from the numerical limitations of 203(b).

The bill increases the available visas numbers for H-1B nonimmigrants and provides an exemption from the numerical limitation for aliens who have earned advanced degrees in science, technology, engineering, or math. The numerical limitation is also supplemented with a flexible limitation that is set according to demand for foreign high-skilled workers.

Requirements for Participating Countries.

The bill authorizes the Secretary of State, Homeland Security, and the Attorney General to negotiate with the home countries of H-2C nonimmigrants to enter bilateral agreements. Once the agreements are finalized, each participating country will be required to accept the return of nationals ordered removed within three days of removal, and to provide incentives for nonimmigrants to return home.

Unemployment Rates.

The Committee passed Senator Kyl's amendment requiring DHS to stop approving petitions for H-2C visas intended for work in any metropolitan statistical area (MSA) whenever the unemployment rate for unskilled workers rises above 11 percent in that MSA.

"L" Inter-company Transfer Visa Reform.

Senator Grassley added an amendment to section 411 of the bill to amend INA section 214(c) and 101(a)(15)(L) to require an alien applicant for an "L" inter-company transfer visa that is intended to allow the opening of a new office to provide evidence of a business plan, sufficient physical premises to carry out the plan, and financial ability to commence business immediately.

DHS could only approve such a petition for nine months and extend the stay of such an alien with the submission of various evidence, including proof that the business plan was complied with and that there has been inter-company business conducted. The spouse-dependent of such an alien could not be approved for work authorization in the initial nine-month period. *(Note: the Judiciary Committee staff has added a Senator Specter amendment to change nine months to one year).*

Title V – Numerical Increases in Green Card Quota Numbers

Additional Green Card Numbers.

The bill reduces visa backlog waiting times by allowing the recapture of unused visa numbers and increases the number of employment-based green cards from 140,000 to 290,000; it also exempts immediate relatives of U.S. citizens from the 480,000 annual cap on family-based immigration.

Country Limits.

The per-country limits for family-sponsored and employment-based immigrants are increased from 7 percent to 10 percent (in the case of countries) and from 2 percent to 5 percent (in the case of dependent, or non-country, areas).

Allocation of Immigrant Visas.

The current 480,000 ceiling on family-sponsored immigrants is redistributed among existing family preference categories: 10 percent is allocated to the first preference -- unmarried sons and daughters of U.S. citizens; 50 percent is allocated to the second preference -- spouses and unmarried sons and daughters of lawful permanent residents, of which 77 percent of such visas will be allocated to spouses and minor children of lawful permanent residents; 10 percent is allocated to the third preference -- married sons and daughters of U.S. citizens; and 30 percent is allocated to the fourth preference -- brothers and sisters of U.S. citizens.

The bill restructures visa number availability to provide additional visas for unskilled workers (who are limited to 5,000/year right now) and other categories where visas have not kept up with demand. The 290,000 ceiling for employment-based immigrant visas is redistributed among the employment-based immigrant visa categories, and certain modifications are made to current categories: 15 percent is allocated to the first preference -- aliens with extraordinary ability, outstanding professors and researchers, and multinational executives and managers; 15 percent is allocated to the second preference -- aliens holding advanced degrees or having exceptional ability; 35 percent is allocated to the third preference -- skilled workers and professionals; 5 percent is allocated to a re-designated fourth preference – investors; and 30 percent is allocated to a re-designated fifth preference -- other workers performing labor or services (previously included in third preference).

Title VI – Immigration Status for the Unauthorized Alien Population

Senator Graham offered an amendment to substitute the Title VI language in the Chairman's mark with what is essentially the McCain-Kennedy legislation for legalizing the unauthorized alien population in the United States. The adopted language places all such aliens in a newly created non-immigrant work-authorized category, and then allows them to immediately file for permanent residence (a "green card") and ultimately a path to citizenship.

Conditional Non-Immigrant Work Authorization and Status (new H-5B visa).

An alien who is present in the United States before the date of introduction may apply to change his or her illegal status to that of legal H-5B nonimmigrant status, provided that the alien was physically present and working before January 7, 2004. The alien's spouse and children may also apply for adjustment. Applicants for H-5B status must pay an initial fine of $1,000, submit fingerprints and other data, and undergo criminal and security background checks. An applicant is inadmissible as an H-5B nonimmigrant for grounds related to criminal conduct, security reasons, terrorist activity, or assisting the persecution of any person. Grounds of inadmissibility related to undocumented status, however, will be waived. The initial period of authorized stay is six years, during which time the H-5B worker is granted employment authorization, is able to travel abroad, and is *not* allowed to adjust status to any other nonimmigrant or immigrant classification. This section also establishes a criminal penalty to ensure privacy and for making false statements on an H-5B application.

Adjustment of Status to Gain a Green Card for Former H-5B Nonimmigrants.

An H-5B nonimmigrant worker may apply for adjustment of status to legal permanent resident (i.e., gain a green card) if the alien satisfies the following requirements: he or she 1) completes the employment requirement; 2) pays an additional $1,000 fine; 3) is admissible under immigration laws; 4) undergoes a medical examination; 5) shows proof of payment of taxes; 6) demonstrates knowledge of English and U.S. civics; 7) undergoes criminal and security background checks; and 8) registers for military selective service. The children and spouse of such an alien may also apply for adjustment. Employers of aliens who apply for adjustment of status shall not be subject to civil or criminal tax liability relating to the employment of the alien.

Senator Feinstein amendment - program for Agricultural Workers to obtain green cards.

The amendment added the following provisions:

- Pilot program to allow certain undocumented agricultural workers to legalize their immigration status in the United States *and to modify the current H2A program*.
- The first step requires that undocumented agricultural workers apply for a "blue card" if they can demonstrate that they have worked in American agriculture for at least *150 work days within the previous two years before December 31, 2005*.
- The second step requires that after "blue card" holders can demonstrate that they have worked in American agriculture for an additional *150 work days per year for three years, or 100 work days per year for five years*, they will then be eligible for a green card.

- Employment will be verified through employer-issued itemized statements, pay stubs, W-2 forms, employer letters, contracts or agreements, employer-sponsored health care, time cards, or payment of taxes.
- This program will be capped at 1.5 million blue cards in five years (without a per-year cap) and sunset after five years.
- Individuals may participate in employment other than agriculture so long as the worker satisfies the 100 or 150 workdays each year.
- Blue card holders (including spouses and children) will be allowed to travel in and out of the United States.
- Spouses of blue card workers will be eligible to apply for their own work permit and their employment will not be limited to agricultural employment.
- Aliens participating in the program will be required to pay a fine of $500, show that they are current on their taxes, and that they have not been convicted of any crime that involves bodily injury, the threat of serious bodily injury, or harm to property in excess of $500.
- The Department of Homeland Security will determine the adequate application fee necessary to offset the costs of this pilot program.
- To avoid backlogs, aliens who receive a green card under this program will be exempt from the overall numerical limitations on visas (i.e., 675,000 visas) and (in effect) the country numerical limitations for Mexico, India, China and the Philippines.

Specter Amendment – "No Cutting in Line" for Green Cards

In response to outside concerns, Senator Kennedy offered a sense of the Senate amendment that DHS should process these, and the unauthorized population, for green cards only after all aliens currently in line for a green card are given one. Chairman Specter requested that the amendment should be changed to make it mandatory, and that was accepted. *(Note: This requirement is not clear. For example, under one possible interpretation, unauthorized aliens applying for employment-based green cards may get their green cards before aliens who are currently in line for a family-based green card. Note further that this language may also apply to aliens applying for green cards after they enter under the H-2C program.)*

The DREAM Act

Senator Durbin offered an amendment that was adopted, which is essentially the "DREAM Act." *(Note: In 2005, Senators Durbin, Hagel and Lugar introduced the Development, Relief, and Education for Alien Minors (DREAM) Act, S. 2075. The bill provides an opportunity to children of undocumented immigrants, who have graduated from high school and have not committed any criminal offense, to attend college or enlist in the military, and ultimately earn lawful resident status in the United States. The DREAM Act was first introduced in the 107th Congress (2001-2002) by then Senate Judiciary Committee Ranking Republican Hatch, with Senator Durbin as the chief cosponsor. The committee approved the bill by a 12-6 vote, but it did not receive a Floor vote before the end of the 107th Congress. In the 108th Congress (2003-2004), Senator Hatch, then Chairman of the Judiciary Committee, again introduced the DREAM*

Act along with Senator Durbin. The Judiciary Committee approved the new version of the bill by a 16-3 vote, but it also did not receive a floor vote before the end of the 108th Congress. The current bill resembles the version that the Judiciary Committee approved in the 108th Congress, but has a registration requirement with the ICE-maintained database of legal foreign students.)

The DREAM Act provisions would:

- Repeal Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, which bars states from granting in-state tuition rates to undocumented immigrants unless the state offers the same rate to all U.S. citizens without regard to residency. Under this section, each state would be free to decide whether an out-of-status student may be treated as a resident for in-state tuition purposes, but no state would be required to provide in-state tuition to out-of-status students.

- Allow applicants to qualify for an initial six-year period of conditional status during which they can work towards permanent resident status if they:
    - Possess good moral character per the statutory definition;
    - Entered the United States at least five years prior to the law's enactment and were under 16 years of age at the time of entry;
    - Are not inadmissible or deportable on specifically enumerated grounds; and
    - Have graduated from high school, obtained a GED, or are admitted to an institution of higher learning as defined in 20 U.S.C. 1001.

- Allow applicants who have met the six-year conditional resident requirement to obtain permanent resident status through:
    - Earning a degree from an institution of higher education (including junior college or trade school) or completing two years in a bachelor's or higher degree program; or
    - Serving honorably in the military for at least two years; and maintaining good moral character and a clean criminal record throughout the six-year period, and maintaining continuous residence, as defined by this act, in the United States.

If the applicant meets the requirements above, he/she will also have satisfied the residency requirements for naturalization, subject to the limitations set forth in section 316 of the Immigration and Nationality Act. It would "grandfather" applicants who already have satisfied the requirements under DREAM (i.e., those who came to the United States before turning 16 and can demonstrate good moral character). However, those who benefit from the "grandfather" clause must meet the six-year conditional requirement and comply with all other requirements. DREAM Act beneficiaries could not receive federal financial aid for tuition assistance. However, they could participate in work-study programs and receive loans.

Title VII-Immigration Litigation Reduction (Appeals and Review) (Removed)

(Note: This title was dropped from the bill according to the Judiciary Committee staff; there was a lack of clarity from the transcript).

Title VIII – Miscellaneous

OTHER AMENDMENTS IN VARIOUS TITLES

The Judiciary Committee accepted other amendments; however, their location in the reported bill was not available at press time. They include the following (as provided by Judiciary Committee):

- Sessions #6251 (Sex abuse of a minor was added to the list of aggravated felonies that would qualify an illegal immigrant for expedited removal)
- Sessions #6240 (assists US Attorneys)
- Sessions #6238 (INA 287(g)) with Coburn 2nd degree (from March 15)
- Sessions #6239 (more detention space)
- Feinstein #6491 (refuges and fraud redraft) with Kyl 2nd degree (added that it would be in conformance with Article 31 of the Refugee Convention)
- Feinstein #6490 (authorized 12,000 new border patrol agents by 2011)
- Cornyn # 6463 (injunctions)
- Brownback #6134 (S visa expanded to aliens assisting against totalitarian regimes)
- Feinstein oral amendment (F-4 visas would have $2000 fee)
- Sessions Word Doc.#71 (DHS will establish a joint immigration enforcement project every state.) with 90-day modification.
- Brownback #6293 (more nurses to fall under the J-1 visa program)
- Brownback #6316 (widows and orphans)
- Durbin #6196 (strikes unlawful presence illegality)
- Durbin #6152 (humanitarian)
- Session #6347 (evading inspection) with revision.
- Kennedy #6231 (retroactivity) with revision to strike the Zadvydas case law requirement to release criminal aliens after six months if their home country will not take them back, (Cornyn) so that it only affects aggregating crimes (Kyl).

THE CORNYN/KYL PLAN:
COMPREHENSIVE ENFORCEMENT AND IMMIGRATION REFORM ACT

[*Note: This is a summary of S. 1438, as introduced. Current cosponsors include Senators Allard, Burr, and Thomas. At press time, it was not clear if the bill would be offered as an amendment in its entirety, or if only sections would be offered.]*

Border Enforcement and Visa Security

- Authorizes sufficient resources, including 10,000 Border Patrol Agents (same figure as Intelligence Reform bill, with monthly reports to Congress on progress made in hiring and deploying the agents) and 1,250 new Customs and Border Protection Officers (working at ports of entry). Authorizes $5 billion over 5 years for accompanying technology (e.g., cameras and sensors) and infrastructure (e.g., stations and checkpoints), to stop illegal border crossing.
- Expands and improves Expedited Removal, which provides a streamlined means of removing aliens who are clearly ineligible to enter the U.S. Authorizes $50 million over 5 years.
- Strengthens US-VISIT entry-exit system to better track and identify aliens who enter the country and those who fail to depart.
- Increases the bond amount for aliens from noncontiguous countries.
- Cancels all visas in the possession of an alien if he or she fails to depart the U.S. at end of the authorized stay.
- Authorizes $50 million over 5 years in grants for American Indian Tribes on border adversely affected by illegal immigration.

Strengthening Interior Enforcement and Leveraging State and Local Law Resources

- Provides the Department of Homeland Security with 10,000 detention beds over 5 years to eliminate the release of illegal aliens into the country.
- Clarifies State and local authority to enforce federal immigration laws.
- Expands the Institutional Removal Program to identify criminal aliens in federal and state correctional facilities and remove them upon completion of their sentences.
- Authorizes $4.45 billion to reimburse states and counties for costs related to the incarceration of criminal illegal aliens and $200 million each year for the costs of processing criminal illegal immigrants through local criminal justice systems.
- Authorizes 1,000 smuggling and status violations investigators over 5 years (200 more per year than the Intelligence Reform bill).

- Authorizes 250 additional DOJ immigration judges and 500 DHS trial attorneys over 5 years.
- Allows the Department of Homeland Security to expeditiously remove aliens who were previously deported and then reentered illegally.
- Increases penalties for alien smuggling, document fraud, drug trafficking and gang violence.
- Establishes a new Assistant Attorney General in the Department of Justice to oversee immigration enforcement and litigation and to ensure high-level DOJ attention and accountability.

Worksite Enforcement

- Authorizes 10,000 additional agents over 5 years to investigate employers who hire illegal aliens. Also authorizes 1,000 new investigators over 5 years to detect fraud in application process.
- Increases the penalties for unauthorized employment of aliens, Social Security fraud and false claims to citizenship.
- Requires within one year issuance of secure machine-readable, tamper-resistant Social Security cards.
- Closes loopholes in identity theft by establishing minimum standards for state-issued birth certificates.
- Requires within one year that all new hires participate in a Social Security-based electronic employment eligibility verification system.
- Assists employers by reducing the number of documents that workers may present to establish identity and employment authorization.

Obligations of Participating Countries

- Requires countries to enter into bilateral agreement with the U.S. government before the nationals of the country are allowed to participate in a temporary worker visa program or Mandatory Departure status.
- Requires aliens to have a minimum level of health coverage, which can be provided by the participating country, the alien or the employer.
- Encourages countries to provide housing incentives for returning workers.
- Requires a participating country to:
    - Cooperate in efforts to control illegal immigration;
    - Immediately accept the return of nationals who are ordered removed from the U.S.;
    - Work with U.S. to reduce gang violence, human trafficking and smuggling; and
    - Provide access to databases and information on criminal aliens and terrorists.

Temporary Worker Program

Establishes new visa category that allows aliens to enter the U.S. to work temporarily when there are no available U.S. workers.

- Limits the visa period to two years, after which the alien must return home for one year. Alien may participate up to three times (for a total of 6 years of employment in the U.S.).
- Requires completion of background checks, health screening, and issuance of biometric documentation to participating aliens.
- Establishes a Temporary Worker Task Force to prepare a report on the effect of the temporary worker program on wages and employment of U.S. workers, which would then form the basis of a cap.
- Family members may visit a principal worker in the U.S. for no longer than 30 days within a given year.

Mandatory Departure and Reentry in Legal Status

- Allows aliens who are present in the U.S. illegally to apply for Mandatory Departure, which gives them time to depart the United States voluntarily and reenter the country through normal legal channels (e.g. as temporary worker).
- Aliens granted Mandatory Departure status are ineligible to obtain permanent resident status (i.e., green card) while in the U.S. – they must depart and reenter through normal legal channels.
- Aliens are registered, fingerprinted, and checked against all available criminal/terrorist lists.
- Aliens are issued secure, biometric identity documentation. The documents will function as identity documents, and employers will use document readers to verify identity and employment authorization.
- Provides incentives for aliens to depart the United States immediately, but all aliens are required to depart prior to five years.
- Aliens who return to their home country within a short period of time may quickly reenter through legal channels as temporary workers and are not required to spend up to 10 years outside of the country.
- Aliens who fail to depart are ineligible for any other immigration benefit for a period of 10 years.

Circular Migration and Visa Backlog Reduction

- Creates temporary worker investment funds to encourage aliens to return home.
- Reduces visa backlog waiting times by allowing the recapture of unused visa numbers and terminating the Diversity Visa Program.

MCCAIN-KENNEDY BILL:
The Secure America and Orderly Immigration Act

(*Note: This is a summary of S. 1033, as introduced. Current cosponsors include Senators Brownback, Chafee, Graham, Kerry, Lieberman, Martinez, Obama, and Salazar. At press time, it was not clear what, if any, portions of the bill would be offered as an amendment. Note that some of the provisions in S. 1033 were accepted by the Judiciary Committee as part of its reported bill.)*

Border Security

- Requires the development and *implementation* of various plans and reports evaluating information-sharing, international and federal-state-local coordination, technology, anti-smuggling, and other border security initiatives.
- Establishes a Border Security Advisory Committee made up of local stakeholders who understand the problems of the border region to provide recommendations to the Department of Homeland Security regarding border enforcement.
- Encourages the development of multilateral partnerships to establish a North American security perimeter and improve border security south of Mexico.

State Criminal Alien Assistance

- Reauthorizes (and increases funding for) the State Criminal Alien Assistance Program, which provides reimbursement to state and local governments for incarcerating undocumented aliens convicted of crimes.
- Creates a new program to pay for additional criminal justice costs associated with undocumented immigrants convicted of crimes.

Essential Worker Visa Program

- Creates a new temporary visa to allow foreign workers to enter and fill available jobs that require few or no skills and when there are no Americans available (the H-5(a) visa).
- The visa is biometric and secure to prevent fraud and duplication.
- Before entering the U.S., applicants must show that they have a job waiting in the U.S., pay a fee of $500 in addition to application fees, and clear all security, medical, and other checks.
- Requires updating of America's Job Bank to make sure job opportunities are seen first by American workers.
- Initial cap on H-5(a) visas is set at 400,000, but the annual limit will be gradually adjusted in subsequent years as the economy dictates.
- Visa is valid for three years, and can be renewed one time for a total of six years; at the end of the visa period, the worker either must go home or must be eligible and accepted as a green card applicant.

- Visa is portable, but if the worker loses his job, he has to find another one within 60 days or go home.
- H-5(a) visa holder can apply for a green card either immediately (sponsored by his employer, as is the case under current law), or after four years in temporary status (on his own).
- Sets up a task force to evaluate the H-5(a) program and recommend improvements.

Enforcement

- Creates a new electronic work authorization system that will ultimately replace the paper-based, fraud-prone I-9 system, to be phased in gradually.
- When operational, the system will be applied universally and cannot be used to discriminate against job applicants.
- Individuals will have the right to review and correct their own records; data privacy protections are in place.
- Immigration-related documents and US-VISIT will be upgraded to enable biometric verification of travelers.
- The Department of Labor will have new powers to conduct targeted audits of employers and ensure compliance with labor laws; also includes new worker protections and doubled fines for illegal employment practices.

Promoting Circular Migration Patterns

- Requires foreign countries to enter into migration agreements with the U.S. that help control the flow of their citizens to jobs in the U.S., with emphasis on encouraging the re-integration of citizens returning home.
- Encourages the U.S. government to partner with Mexico to promote economic opportunity and reduce the pressure to immigrate to the U.S.
- Encourages the U.S. government to partner with Mexico on health care access so that the U.S. is not unfairly impacted with the costs of administering health care to Mexican nationals.

Family Unity and Backlog Reduction

- Immediate relatives of U.S. citizens are not counted against the 480,000 annual cap on family-sponsored green cards, thereby providing additional visas to the family preference categories.
- The current per-country limit on green cards is raised slightly to clear up backlogs.
- Income requirements for sponsoring a family member for a green card are changed from 125% of the federal poverty guidelines to 100%, and other obstacles are removed to ensure fairness.
- The employment-based categories are revised to provide additional visas for employers who need to hire permanent workers, and the annual cap is raised from 140,000 to 290,000.
- Immigrant visas lost due to processing delays are recaptured for future allotments.

Adjustment of Status for H-5(b) Non-Immigrants

- Undocumented immigrants in the U.S. on or before May 12, 2005 (date of introduction of S. 1033) can register for a temporary visa (H-5(b)), valid for six years.
- In order to obtain this visa, workers must pay a $1,000 fine (and another $1,000 if they want to stay) for breaking the law and pay any back taxes.
- Applicants have to show work history, a clean criminal record, and that they are not a security problem to be eligible for a temporary visa.
- They will receive work and travel authorization.
- Their spouses and children are also eligible.
- In order to obtain permanent status, workers will have to meet a future work requirement, clear additional security/background checks, pay a $1,000 application fee and meet English/civics requirements.

Protection Against Immigration Fraud

- Attempts to eliminate the exploitation of immigrants by *notorios* or other unlicensed immigration law practitioners by imposing new legal requirements on such individuals.
- Allows immigrants defrauded by unauthorized legal representatives to file actions against these perpetrators.

Civics Integration

- Creates a public-private foundation under the USCIS Office of Citizenship to support programs that promote citizenship and to fund civics and English language instruction for immigrants.
- Provides for new money to fund civics and English language instruction for immigrants.

Promoting Access to Health Care

- Extends the authorization of federal reimbursements for hospitals that provide emergency care to undocumented immigrants; includes H-5(a) and (b) workers in the program.

Miscellaneous

- Distributes the fees and fines paid by H-5(a) and (b) workers among the DHS and DOS for processing, DHS for border security efforts, DOL for enforcement of labor laws, SSA for development of the employment eligibility confirmation system, hospitals to pay for uncompensated health care, and the USCIS Office of Citizenship for civic integration and English classes.
- Requires the dissemination of information related to the provisions of this legislation.
- Includes anti-discrimination protections that cover all workers, including H-5(a) and H-5(b) visa holders.

Additional Possible Amendments

Agricultural Job Opportunities, Benefits, and Securities Act (S. 359): This legislation, introduced by Senator Craig, currently has 48 cosponsors; it would change the H-2A foreign agricultural worker program to make it easier for agriculture workers to remain in the United States. *(Note: The Feinstein amendment to the reported bill, mentioned above, is the same as Senator Craig's bill with some changes to the green card provisions and with an expansion of the current H-2A sheepherder carve-out to cover dairy-related work.)*

Border Security and Interior Enforcement Improvement Act (S. 2377): This comprehensive reform bill was introduced by Senator Nelson of Nebraska, and is cosponsored by Senators Coburn and Sessions; among its many security and enforcement provisions, it would authorize the increased use of military equipment for use in securing the borders, and would authorize the construction of a double-layered fence that would cover the land border with Mexico from the Pacific Ocean to the Gulf of Mexico. It also provides for additional personnel in various agencies; visa reform and alien status; employment verification; and penalties and enforcement.

Other amendments are likely.